BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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| In the Matter of | | |
| Computer Reservation Systems (CRS) Regulations; Statements of General Policy; Proposed Rule | Docket Nos. | OST-97-2881<br>OST-97-3014<br>OST-98-4775<br>OST-99-5888 |

**MOTION FOR LEAVE TO FILE**
**AND**
**REPLY OF SABRE INC. IN SUPPORT OF PETITION FOR FACT HEARING**

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January 23, 2003

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**Motion for Leave To File**

On December 23, 2002, Sabre Inc. ("Sabre") filed a Petition For Fact Hearing with the Department. On January 9, 2003, in response to the request of Delta Air Lines, the Department extended the time period for responses to Sabre's request.

Answers to the Petition were filed by Amadeus Global Travel Distribution, S.A. ("Amadeus"), American Airlines, Inc. ("American"), America West Airlines, Inc. ("America West"), the American Society of Travel Agents ("ASTA"), Continental Airlines, Inc. ("Continental"), Delta Air Lines, Inc. ("Delta"), Galileo International ("Galileo"), Northwest Airlines, Inc. ("Northwest"), Orbitz, L.L.C. ("Orbitz") and United Air Lines, Inc. ("United"). Several of the Answers misconstrue the purpose and proposed implementation of the Fact Hearing sought by Sabre and misinterpret certain of the cases cited by Sabre in its Petition. Sabre respectfully requests an opportunity to reply to these answers and explain how the convening of a Fact Hearing by the Department need not

delay the revised procedural schedule that the Department has recently adopted for this proceeding. Grant of this motion will not unduly delay this proceeding, and acceptance of this Reply will provide the Department with a more complete record upon which to evaluate the merits of Sabre's petition.

## Reply Of Sabre, Inc. In Support Of Petition For Fact Hearing

### Introduction

Petitioner, Sabre, in further support of its Petition for Fact Hearing dated December 23, 2002 ("Sabre's Petition"), hereby replies to the Answers to its Petition submitted by Amadeus, American, America West, ASTA, Continental, Delta, Galileo, Northwest, Orbitz, and United. Those most affected by the proposed CRS rule – the two other large CRSs not owned by major U.S. carriers – Galileo and Amadeus, support Sabre's petition, as does ASTA, the largest trade association for travel agents. Predictably, a handful of major U.S. air carriers, and the major airline-owned Internet ticket site, Orbitz, oppose the request. Those opposing Sabre's request generally misconstrue the purpose and structure of the proposed Fact Hearing. A Fact Hearing, properly limited and promptly held, would benefit all parties by providing the Department with a firm foundation for its ultimate decision to withdraw or revise its CRS rules.

Sabre agrees that the Department's CRS rulemaking should be completed as soon as reasonably possible. Sabre does not seek any further extension of the initial comment or reply periods. Nor does it seek a full APA adjudicative hearing. It simply requests an opportunity for all parties concerned to see, test, weigh and reach sensible conclusions about the factual evidence on which the Department relies in its Notice of Proposed

Rulemaking regarding Computer Reservations Systems, 67 Fed. Reg. 69366 (Nov. 15, 2003) ("NPRM"). This can be done in a limited proceeding managed by a presiding officer and structured to proceed expeditiously. *See* Sabre's Petition at 10.

## I. SABRE SEEKS AN APPROPRIATELY TAILORED FACT HEARING, NOT A FULL APA HEARING

Several Answers state that the Department is not required to turn informal rulemaking into an adjudicative proceeding. *See*, *e.g.*, Orbitz Answer at 5. Sabre agrees. Sabre's Petition does not call for a full adjudicative proceeding. Rather, based upon established case law and administrative best practice, Sabre submits that (a) the Department's rulemaking record must include relevant studies, (b) the facts on which the rulemaking relies must be supported by substantial evidence, and (c) the Fact Hearing must be tailored to the issues considered.

### A. The Law Requires The Department To Include In The Public Record The Principal Relevant Studies Available To It When The Comment Period Begins, Including Studies Or Tests Considered Or Relied Upon In Promulgating The Rule.

All but two of the Answers[1] recognize the truth of Sabre's position that the public record should be supplemented with studies considered or available to the Department during preparation of the NPRM (or its predecessor Advanced NPRM and Supplemental NPRM). *See* Sabre's Petition at 13-15. This includes the results of the formal study of

[1] America West seems to argue that, even if the Department withheld such studies, the fact that the issues involved have "been the subject of intense debate among interested parties in a public forum" would excuse the error. America West Answer at 5. Delta asserts that "certain of the Department's factual underpinnings. . . are outdated or incorrect" but that a lengthy comment period is sufficient to correct these errors. Delta Answer at 1. *See id.* at 3. This is a plain misreading of the case law. *See*, *e.g.*, *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir 1982), *quoted in* Sabre's Petition at 13.

the CRS industry begun in September 1994 and referred to in the 1997 and 2000 Federal Register notices. *See* Sabre's Petition at 14. If that study was not completed, its various draft versions should be included in the record and the Department should explain why it was not updated and put into final form.

### B. The Facts On Which The Department Relies Must Be Supported By "Substantial Evidence" In The Rulemaking Record.

Sabre recognizes that the "arbitrary and capricious" standard applies to informal rulemaking, 5 U.S.C. § 706(2)(A), whereas "substantial evidence" is the appropriate test for formal adjudication and formal rulemaking. 5 U.S.C. § 706(2)(E). *Cf.,* American Airlines Answer at 2; America West Answer at 3; Orbitz Answer at 4-5. This is a distinction without a difference; when applying the requirement of factual support in the context of judicial review of rulemaking, "the substantial evidence test and the arbitrary or capricious test are one and the same." *Ass'n of Data Processing Serv. Orgs v. Bd. of Governors of the Fed. Res. Sys.,* 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.); *see also id.* at 686; *accord Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) (emphasis added).[2] Indeed, and contrary to the claims made by Orbitz in its Answer (at 4-5) that a different standard applies to informal agency action not subject to the APA's substantial evidence standard, Orbitz Answer at 5, the court in *Ass'n of Data Processing* stated clearly that:

> We hold, therefore, that the § 1848 "substantial evidence" requirements applicable to our review here demands a quantum of factual support no different from that demanded by the substantial evidence provision of the

[2] Sabre does not suggest that the proposed rule is ripe for judicial review. When such review occurs, however, any final rule that embodies misconceptions about, and severe gaps in, the adjudicative facts referenced in the NPRM cannot be sustained under the arbitrary and capricious standard.

> APA, which in turn is no different from that demanded by the arbitrary or capricious standard.

745 F.2d at 686.

### C. To Avoid A More Prolonged Proceeding Or A Final Rule That Will Be Held To Be Arbitrary And Capricious Because Of A Lack Of Supporting Substantial Evidence, It Is Imperative That The Department Hold An Appropriately Tailored Fact Hearing.

Several Answers take issue with Sabre's supposed contention that the APA or the Due Process Clause requires a formal adjudicative hearing in this informal rulemaking. *See, e.g.*, Delta Answer at 2, United Answer at 4-5. Sabre's position, however, is not as broad as its opponents claim.

Sabre simply asks the Department to recognize the pervasive influence in the NPRM of outdated adjudicative facts, incorrect assumptions about current adjudicative facts and inconsistent statements about the facts themselves. Sabre's Petition at 2-4. ASTA noted that the record, as it stands now, "lacks sufficient reliable and current evidence to serve as the legal basis for a rule." ASTA Answer at 2. An appropriately tailored fact hearing is the best forum for eliciting correct, up-to-date factual information. *Id*. at 5. Amadeus, Galileo and ASTA support Sabre's Petition. Amadeus succinctly states:

> To the extent that Sabre's Petition seeks the employment of procedures by the Department that will result in a fuller record and the further development and updating of critical facts relevant to this proceeding, Amadeus supports those goals. Amadeus agrees with Sabre that in several critical respects, the NPRM is based on outdated views of the CRS business and not well-grounded in the reality of today's fast changing travel distribution business . . . . A hearing would also give the Department a good opportunity to gather and weigh facts on several key factual matters to which the NPRM requests public input.

Amadeus Answer at 1-2. Tellingly, none of the Answers disputes the firmly rooted policy that strongly favors a Fact Hearing in agency rulemaking where adjudicative facts are crucial to the outcome of the final rule. *See pp.* 12-13, discussing *United Air Lines v. C.A.B.,* 766 F.2d 1107 (7th Cir. 1985), *infra.* In particular, no Answer responded to the longstanding recommendation of the Administrative Conference of the United States (Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking,* 41 Fed. Reg. 29654 (July 19, 1976)) that is directly on point to this issue. It recommended that agencies:

> 1. . . . .
>
> (e) Hold[] conferences open to the public, on adequate notice, when an opportunity for all interested groups (such as agency staff, directly affected persons, agency policymakers and public interest groups) to question one another would be effective in resolving, narrowing or clarifying the disputed issues.
>
> (f) Hear[] argument and other oral presentation, when the presiding agency official or officials may ask questions, including questions submitted by interested persons.

A notice-and-comment process cannot resolve the complex factual disputes that the NPRM raises because written comments do not provide an opportunity to test the fact bases of DOT's assertions. Factual gaps and unanswered questions will require additional explanations or fact-finding at some point. That point should be at the NPRM stage to permit the rulemaking to proceed and conclude expeditiously.

## II. AN APPROPRIATELY TAILORED FACT HEARING IS FEASIBLE AND NEED NOT DELAY THIS PROCEEDING.

### A. Appropriately Tailored Hearing

The Fact Hearing would focus on specific fact issues. The presiding officer, in addition to limiting the issues to be reviewed, would:

- Designate lead party questioners;
- Set time limits for the hearing; and
- Designate Department personnel available for questioning regarding the fact bases of the NPRM.

*See* Sabre's Petition at 2-3, 10.

### B. Expeditious Hearing

A Fact Hearing need not delay the Department's CRS rulemaking. *Cf.* Northwest Answer at 5, Delta Answer at 2, United Answer at 7-9. By January 31, 2003, the Department could grant Sabre's Petition, identify the hearing officer, and outline an agenda for the hearing. A pre-hearing meeting could take place on February 10 and the hearing could commence no later than March 1. The hearing could be concluded within ten days unless the presiding officer found good cause to extend it. In any event, the record could be completed by March 17 (*i.e.*, the end of the comment period), thus allowing all participants an opportunity to respond during the Reply period. Under this proposed timeline, the current schedule for this rulemaking would not be extended by even a single day.

## III. SIGNIFICANT ISSUES OF ADJUDICATIVE FACT NEED TO BE RESOLVED

Sabre cited numerous adjudicative fact disputes embedded in the NPRM. *See* Sabre's Petition at 3-4, 7-9 and Appendix A. Amadeus agrees that a number of these are "key factual matters." Amadeus Answer at 1-2. But other Answers attempt to mischaracterize the disputed facts as mere "policy questions, legal issues or predictions about the future state of the airline distribution industry and competition. . . ." Northwest Answer

at 5.[3] These assertions are simply wrong. In fact, it is the NPRM's reliance on unsupported policy pronouncements, the NPRM's inconsistent statements about what the facts are or may be, and the NPRM's fact-free assumptions about the present and future state of competition, that necessitate a Fact Hearing.

A few examples from Sabre's Petition will illustrate the adjudicative fact issues that should be determined by a Fact Hearing:

> 1. Quotations from NPRM: "Competition and market forces have not disciplined the price or quality of services offered airline participants. The systems accordingly have established booking fees for airlines that exceed their costs of providing CRS services to the airlines." (*Id.* at 69419)
>
> "We have made no finding that each system's booking fees exceed the system's costs of providing services to airlines." (*Id*. at 69400)
>
> ***Disputed Issues of Material Fact: (a) Whether competition and market forces have disciplined the price or quality of CRS services to airlines? (b) Whether CRSs compete for airline participants? (c) Whether CRS booking fees exceed costs?***
>
> 2. Quotation from NPRM: "[B]ooking fees may be imposing burdensome costs on airlines and, if so, higher fares for consumers." (*Id*. at 69398)
>
> ***Disputed Issues of Material Fact: (a) Whether (and, if so, to what extent) booking fees impose burdensome costs on airlines, as compared to other cost factors? (b) Whether (and, if so, to what extent) airlines pass along the cost of CRS booking fees to consumers in the form of higher fares?***
>
> 3. Quotation from NPRM: "Every system seems to continue to engage in subscriber contract practices that keep airlines and travel agencies from using alternatives to the systems . . . . The likely result is higher airline costs and thus higher fares for consumers." (*Id*. at 69383)

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[3] America West's fear of "Balkanization" is unfounded and incorrect. America West Answer at 5. The adjudicative fact issues relevant to this rulemaking reach throughout the chain of airline distribution -- from air carriers and CRSs to ticket agents and air travelers. To the extent any issue involves facts specific to one or a few entities (such as non-airline-owned CRSs), a Fact Hearing is required to permit full consideration of such distinguishing facts. *See United Air Lines v. C.A.B.*, 766 F.2d 1107, 1119 (7th Cir. 1985).

***Disputed Issues of Material Fact: (a) Whether CRS subscriber contracts prevent airlines and travel agencies from bypassing CRSs? (b) Whether (and, if so, to what extent) lack of bypass in fact contributes to airlines' charging higher fares to consumers?***

4. Quotation from NPRM: "Productivity pricing . . . may harm consumers both directly and indirectly. It may keep travel agents from booking the best fares for their customers, and it increases airline costs by preventing airlines from using alternative electronic means of communicating with travel agencies." (*Id*. at 69408)

***Disputed Issues of Material Fact: (a) Whether productivity pricing prevents travel agents from booking the best fares for their customers? (b) Whether productivity pricing increases airline costs? (c) Whether productivity pricing prevents airlines from bypassing CRSs to communicate directly with travel agencies?***

5. Quotation from NPRM: "The Internet has not mitigated the risk that the systems (whether or not owned by the airlines) may use that power to distort airline competition." (*Id*. at 69377)

***Disputed Issues of Material Fact: Whether (and, if so, to what extent) travelers' and travel agents' use of the Internet has (a) reduced the importance of CRSs in airline distribution, (b) reduced CRS' ability to affect competition among airlines, and (c) enhanced competition among airlines?***

Moreover, publicly available data contradicts many of the NPRM's central assertions. For example:

- The NPRM's market power analysis (the predicate for continued regulation) depends critically on the proposition that passengers do not view airline web sites and other channels as substitutes for traditional travel agents. According to the NPRM, "airlines . . . have little ability to encourage most consumers to shift their bookings from travel agents to their own websites." 67 Fed. Reg. at 69378. To the contrary, travel agents themselves observe that "currently [in 2002], 39 million people make travel reservations online," 25% more than in 2001.[4]

[4] ASTA Agency Automation Study 2002, p. 10. Those 39 million travelers are 35% of *all* travelers. "Currently, 21 million Americans *usually* purchase their travel on the Internet, up *75 percent* from 2000." *Id.*

- As a result, CRSs' share of bookings has also declined dramatically – from 80% in 1992 to 55% in 2002, according to Sabre estimates. CRSs' current shares *include* bookings through on-line travel agents (Travelocity, Expedia, Orbitz); passengers who use on-line travel agents are obviously willing to forego the "expertise and personal services that many travelers consider invaluable," 67 Fed. Reg. at 69378, and instead use other web sites – including airline web sites.

- The growth of the Internet – and of Internet-only fares – has compelled CRSs to compete by offering those fares to travel agents and passengers. Contrary to the NPRM's assertion that "airlines have not had significant bargaining leverage against the systems, because the systems have not needed to compete for airline participants," 67 Fed. Reg. at 69380, CRSs *have* competed for airline participation *and have lowered prices to compete.* For example, Sabre cut booking fees 10% to obtain US Airway's web fares, and guaranteed that reduced price for three years.

Finally, a compelling need exists to explore the underlying facts concerning the Department's unprecedented assertion of authority to regulate CRSs that are not owned, controlled or marketed by airlines. For almost two decades, the Department recognized it could regulate CRSs only indirectly by regulating the conduct of their air carrier owners. Now, in a complete turnabout – with no citation to regulatory or case law support – the Department's NPRM seeks to extend its reach directly to CRSs (even in the absence of airline ownership) by adopting the novel theory that CRSs somehow are "ticket agents." The Department does so despite:

> (i) the plain language meaning of "ticket agent," which Webster's describes as "one who acts as an agent of a transportation company to sell tickets for travel by train, boat, airplane, or bus" – CRSs neither act as "agent" nor "sell tickets;"
>
> (ii) the fact that CRSs are not authorized to issue tickets on behalf of airlines through ARC;
>
> (iii) the contract terms between CRSs and participating carriers that clearly specify the relationship between them is one of independent contractors and specifically do not create or imply any "agency" relationship; and,
>
> (iv) as Judge Posner observed in the *United* case: "[t]he Board's rules are limited to systems owned by airlines; it has no regulatory authority over the independent provider." *United Air Lines v. C.A.B.*, 766 F.2d 1107, 1130 (7th Cir. 1985).

Although the NPRM discusses certain "functions" that allegedly are performed by non-airline CRSs (67 Fed. Reg. at 69384-85), it fails to address the material facts as to whether a non-airline CRS action is either a "principal" or an "agent" of an airline in the sale of air transportation. Sabre believes that the NPRM assertion that it is a "ticket agent" pursuant to Section 411 is wrong both as a matter of law and fact. Moreover, assuming arguendo that a non-airline CRS is either a principal or agent, several adjudicative facts must be resolved, including whether a particular non-airline CRS "sells" air transportation, "offers" air transportation "for sale", "negotiates for" air transportation, or "holds itself out" as "selling", "offering for sale", or "arranging for" air transportation. These critical facts go to the heart of the Department's authority to regulate CRS systems that are not owned, controlled or marketed by airlines. Indeed, these are precisely the types of specific, non-policy facts that must, under 49 U.S.C. § 41712, be found by the Department after "notice and hearing."

The assumptions underlying the NPRM's core tenets are thus based on factual assertions that are erroneous or unsupported. The D.C. Circuit similarly found adjudicative fact questions in a case involving judicial review of an Energy Department rulemaking under a statute that required a fact-finding hearing where there were disputed issues of material fact:

> We believe that NRDC raised disputed issues of material fact. While some of NRDC's "topics" did draw into question large controversies over policy, others addressed factual questions in the most rigorous sense of the words. For example, NRDC asked whether DOE had considered technologies developed since 1980 in assessing standards; whether DOE considered the effect of different discount rates and different standard levels; and whether DOE's analysis of savings considered the marginal or average cost of energy production. In our view, these questions were clearly material to the rulemaking.

Opponents of Sabre's Petition challenge Sabre's reliance on *United Air Lines v. C.A.B.,* 766 F.2d 1107 (7th Cir. 1985) and argue that it supports their opposition to a Fact Hearing. See, e.g., Northwest Answer at 2, American Answer at 3, United Answer at 5-6, Orbitz Answer at 6-7, Delta Answer at 2. First, Judge Posner carefully noted that Circuit precedent required him to rule against the airline's request for a full APA adjudicative hearing. But the hearing that Sabre requests is far more limited and focused than the one at issue in the *United* case. More importantly, however, the court noted that it was "sympathetic" to United's petition that such an APA hearing should have been held. And thus, the court said that the result might have been different if, as in the NPRM, the CAB rule had "come down to one or two firms." 766 F.2d at 1119. Sabre's fact hearing petition is more limited and focused. It seeks a non-APA hearing to test adjudicative facts. Sabre's focus is on ground-level facts about the way competition works in today's airline distribution marketplace. These are concrete facts "that could not rationally be found without providing an opportunity for cross-examination or some other trial-type procedural safeguard." Id. The hearing's purpose will thus be "limited to determining whether a particular event or events occurred" in the way that they are described in the NPRM. CAB Order 83-10-74 at 3, *quoted in* Orbitz Answer at 7.

Sabre recognizes that the NPRM raises complex antitrust questions about matters such as market power, vertical integration and network effects. Sabre will address them in its comments. But the purpose of a Fact Hearing, as Sabre has proposed, is quite different. It is not to debate thorny ultimate policy issues. It is, instead, to verify the factual accuracy of the assumptions on which the NPRM builds its inferences about market power, vertical integration and the rest – and to correct the record where the facts do not

support the NPRM's assumptions. That can only be done by testing, in the context of a hearing, the factual basis for the NPRM's assertions that CRS booking fees lead to higher fares for consumers, that CRSs prevent travel agencies and airlines from using the Internet, and so forth.

## IV. THE DATA QUALITY ACT REQUIRES AN APPROPRIATE FACT HEARING

Several commenters take issue with Sabre's contention that a fact hearing might be necessary under the new Data Quality Act to facilitate the correction of information maintained or disseminated by the Department. *See*, *e.g.*, Continental Answer at 2; Northwest Answer at 6; Orbitz Answer at 8; United Answer at 4. However, the eleven factual assertions that require correction, quoted directly from the NPRM, clearly fall under the purview of this new Act. *See* Sabre's Petition at 33 (Appendix B).

## V. POSSIBLE SUNSET OF THE RULE

United correctly observes that there are good reasons for allowing the CRS rules to expire as currently scheduled on March 31, 2003. United Answer at 8-9. But sunset is only one option. The NPRM also contemplates the possibility of continuing regulation in some form. Deciding whether to continue the CRS rules -- and, if so, shaping the precise content of those rules -- requires a firm factual understanding that can only be gained by means of the Fact Hearing that Sabre requests.

## Conclusion

For the reasons set forth above and in its Petition, Sabre respectfully requests leave to file this Reply and urges the Department to schedule and hold a Fact Hearing promptly. Such a hearing, without prolonging the Department's review of its CRS rules, will ensure the ultimate success of the rulemaking by disclosing and developing up-to-date information on the disputed material facts in this proceeding.

Respectfully submitted,

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January 23, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of January, 2003, I arranged for a copy of the foregoing Motion and Reply to be served by electronic mail to the following parties:

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